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TAGS: [KCOR](#) [EFIN](#) [OECD](#) [UK](#)
SUBJECT: BAE JUDICIAL REVIEW: HOUSE OF LORDS HEARS HMG
APPEAL

REF: A. 06 LONDON 8373
[1](#)B. LONDON 1033

Classified By: Economic Counselor John McNamara for
Reasons 1.4 (b) and (d)

[1](#)1. (SBU) Summary: On July 7-8 the Law Lords of the House of Lords heard HMG's appeal of the High Court ruling that Serious Fraud Office (SFO) Director Wardle acted unlawfully when he abandoned the anti-corruption investigation into BAE Systems' dealings in Saudi Arabia. HMG argued that Wardle had not unlawfully given into threats, but rather weighed the threats as part of his proper assessment of evidence; the question of breaching rule of law does not apply; and it is not for UK courts to interpret the OECD anti-bribery convention. Lawyers for Campaign Against the Arms Trade (CAAT) and The Corner House countered that rule of law does apply, the SFO Director needed to show that all alternatives were exhausted before abandoning the investigation -- the arguments that prevailed in the first court case -- and the SFO Director's understanding of the OECD convention is relevant because he said his decision was in compliance with the convention. The court will decide later this year. If the Lords uphold the High Court ruling SFO could be ordered to reconsider its decision to drop the investigation or to reopen the investigation directly. End Summary.

Background

[1](#)2. (U) In December 2006, HMG decided to abandon a multi-year investigation into alleged corrupt dealings by BAE Systems in connection with its arms contracts with Saudi Arabia citing concerns of national security. The decision drew domestic and international criticism (Ref A), which has not abated. Two UK NGOs (Campaign Against the Arms Trade, CAAT, and The Corner House) challenged the legality of the decision in the UK courts on the basis that it was unlawful to give in to "the threat made by Prince Bandar of Saudi Arabia" and that the decision was inconsistent with the UK's international obligations, specifically Article 5 of the OECD anti-bribery convention. On April 10, 2008 the UK High Court ruled that the Director of the Serious Fraud Office (SFO) acted unlawfully when he stopped this corruption investigation (Ref B).

[1](#)3. (U) HMG chose to appeal this decision to the House of Lords, also known as the Law Lords, the UK's equivalent to the U.S. Supreme Court. (Note: There are 12 Law Lords, who are professional judges appointed by the Queen on the advice of the Prime Minister. These Lords are full Members of the House of Lords, although from October 2009 the UK will separate this legal function from the House of Lords. End Note). Five Law Lords heard the case on July 7-8: Lords Bingham, Hoffman, Rodger, Brown and Baroness Hale. The full

set of submissions may be found at:

http://www.caat.org.uk/judicialreview/jr/sfoa_ppeal.php

This site includes the 39 page HMG (on behalf of SFO) case, the 69 page CAAT case, witness statements from FCO, SFO Deputy Director Helen Garlick, former SFO Director Robert Wardle, and a CAAT statement about what they purport to know about U.S. and Swiss investigations. The documents drawn upon in the course of the presentations were in eighteen volumes)- approximately a 3-foot-high stack of paper.

¶4. (U) According to a handout provided to those attending the hearing, the issues the Law Lords are considering for the appeal are: a) Is it unlawful for a prosecutor to surrender to a threat made by a person outside the control of the courts or public authorities of the UK, for the purpose of halting a criminal investigation or prosecution, unless there is no alternative course open to the prosecutor?; b) Was there a failure to properly consider national security by the prosecutor in this case?; c) Is the court entitled to construe an unincorporated treaty (OECD Convention on Combating Bribery of Foreign Public Officials ("the OECD Convention")), where the prosecutor has stated that his decision is in compliance with the treaty?; and d) In what circumstances, if ever, is national security a consideration relevant to Article 5 of the OECD Convention?

The Government Case

¶5. (U) HMG's lawyer, Jonathan Sumption, QC, speaking for most of the day on July 7, argued that: 1) Wardle did not give in to Saudi threats, but rather weighed the credibility and consequences of the threats as part of his proper assessment

of evidence) therefore he did not surrender his authority or act unlawfully; 2) the courts should involve themselves sparingly in SFO's decisions, it is not their role; 3) the question of breaching rule of law does not apply, as abandoning the case on public interest grounds does not imply a violation of rule of law (Note: Attorney General Goldsmith said in December 2006 that public interest outweighed rule of law in making the decision; Sumption is arguing that the two are not linked); 4) Wardle has the discretion to determine which cases to prosecute, a flexibility not unique to the UK -- other countries, such as Germany and Canada, also have it; and 5) UK courts should not discuss whether these actions violate the OECD anti-bribery convention as it is the jurisdiction of the members of the OECD Working Group on Bribery to make such decisions. He urged the Lords not to quash SFO's decision (as the High Court ruled) just to have the same decision be made to abandon the case under unspecified "different grounds."

The CAAT case

¶6. (U) On July 8, lawyers representing CAAT and The Corner House responded. David Pannick, QC, pushed back on the rule of law point, the basis for CAAT's success in the original hearing. He argued that for rule of law to be satisfied: 1) who the accused is or who they know should not be considered, although there can be other reasons not to investigate a crime; and 2) SFO can only abandon an investigation due to strict necessity, which requires the SFO Director to show that all alternatives were exhausted and that he understood all parts of the decision (e.g. what Article 5 of the OECD anti-bribery convention means). Pannick drew on numerous examples to argue that SFO had not exhausted all options, in particular that FCO had not tried to dissuade the Saudi threats.

¶7. (C/NF) Dinah Rose, QC, argued that the meaning of Article 5 of the OECD convention)- that relations with another state or economic interests will not be considered -- is relevant because SFO voluntarily chose to consider it although under no obligation to do so. SFO regularly said the decision was in compliance with the OECD) which, Rose argued, it clearly was not. (Note: Rose was overheard

commenting during the break that the judges did not want to hear that part of the evidence. Indeed, they sought to shorten the length of time she had available to make her case. End Note.)

Media Spin

18. (SBU) Only the Guardian had a reporter at the hearing, and its articles focused on the more sensational bits of the barristers' statements dealing with Saudi Arabia's threats. (Note: Neither side questioned that threats were made.) On July 8, the Guardian trumpeted that "government lawyers denied that a Saudi prince had tried to pervert the course of justice" to halt the corruption investigation. The article focuses on HMG's argument (citing the new witness statements) that the government did try to resist the threats and that the threats clearly came from the Saudi government itself, not only from a Saudi official with a personal interest in seeing the investigation halted (Note: The article assumes the official to be Prince Bandar, although Sumption never mentioned a name in court). On July 9, the point taken from the CAAT case was that the government did not try to fend off Saudi threats. The article flags Pannick's assertion that the UK Ambassador to Saudi Arabia "confessed" that he "should have done more" to disabuse a Saudi official from making threats. (Note: Full text in the FCO witness statement, which HMG's barrister also relied on). The article concludes with Pannick's statement that U.S. and Swiss authorities continue their investigations "without any suggestions of damage to national security."

Next Steps

19. (C/NF) The House of Lords is the UK's highest court of appeal. If it upholds the High Court's ruling, the case will return to the High Court to discuss a remedy for the unlawful behavior. Some remedy options include: instructing the SFO Director to "retake" the decision or ordering SFO to reopen the investigation. CAAT is pressing for the latter; the former leaves open the possibility that SFO will reconsider the reasons for dropping the case and once again choose to abandon the investigation -- but for different reasons. If the Lords overturn the High Court's ruling, CAAT's judicial challenge will have failed. The Law Lords deliberated privately following the presentations and said they would make a judgment in due course -- likely later this year after Parliament's summer recess.

Comment

110. (C/NF) The hearing ran for two long days. Only HMG and CAAT lawyers made presentations, speaking for hours at a time without a break. No witnesses were called, although additional witness statements were submitted in evidence. The Lords periodically challenged assertions from both sets of lawyers, often citing earlier cases they themselves had been involved with. Neither party had ready answers any time the judges interrupted the flow of their arguments with questions. CAAT's lawyers drew clever examples that occasionally sparked laughter in the audience, but the Law Lords questioned them more than HMG's barrister. In particular, they asked if strict necessity was a well-established rule. They also challenged the arguments that encouraged the court to make a ruling on whether the SFO Director had acted in accordance with the OECD convention. However, it was CAAT's arguments that prevailed in the original High Court ruling.

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